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IN THE

Supreme Court of the United States

October Term, 1953

No. 511

ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Elwood C. Martin, Fred A. Nemec, and Robert W. Nemec, a co-partnership doing business as Nemec Combustion Engineers, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit, rendered on October 19, 1953, which ordered entry of a decree enforcing an order of the National Labor Relations Board.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C., Sec. 1254 (1) and the Act of June 7, 1934, C-246, 48 Stat. 926; July 5, 1935, C-372, 10, 49 Stat. 453, as amended June 23, 1947, C-120, Title 1, Sec. 101, 61 Stat. 146; June 25, 1948, C-648, Sec. 32, 62 Stat. 991; 29 U. S. C., Sec. 160(e).

The Opinion of the Court of Appeals for the Ninth Circuit was filed October 19, 1953. An order was made by that Court staying the mandate until December 28, 1953, pending the filing of this Petition for Certiorari.

Opinion Below.

The opinion of the Court of Appeals is not yet reported but is printed in the record [R. 238].

Questions Presented.

The questions presented by this petition are:

1. Whether the National Labor Relations Act as amended by the Labor Management Act (61 Stat. 136, 29 U. S. C., Sec. 160(b)) empowers the National Labor Relations Board to issue a complaint more than six months after the alleged commission of certain unfair labor practices to wit: alleging the discharge of two named employees for engaging in "concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection" when the original charge filed within the six months period alleged the commission of a different unfair labor practice, to wit, the discharge of the same two employees for "engaging

in union organizational activities for the purpose of discouraging the formation of the union." The said Section 10(b) of the Act providing "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

2. Whether there was substantial evidence to support the following findings of the Board:

(a) That an employee was discharged for engaging in "concerted activities" when the undisputed evidence disclosed that the employee stated that he was quitting his job and the employer believed he was.

(b) That an employee was discharged for engaging in "concerted activities" when the evidence disclosed that he was guilty of inefficiency and insubordination but he was also secretly, and without the knowledge of the employer, engaged in union organizational activities.

3. Whether when a charge of unfair labor practice against an employer is dismissed at the conclusion of the evidence in chief of the general counsel for insufficient evidence it is error depriving the employer of a fair trial to fail to make findings in favor of the employer on the dismissed charge and to thereafter draw adverse inferences and conclusions based upon the evidence introduced to support the dismissed charge.

Statute Involved.

Pertinent provisions of the National Labor Relations Act as amended by the Labor Management Act (61 Stat. 136, 29 U. S. C. Supp., Sec. 151 *et seq.*) are set forth in the appendix.

Statement.

On February 1, 1951, a charge was filed with the Board against petitioners by a Union alleging that petitioners had engaged in unfair labor practices affecting commerce in that petitioner discharged two employees on December 28, 1950 "upon the grounds that these employees were engaging in union organizational activities for the purpose of discouraging the formation of the Union" [R. 1-2].

On November 14, 1951, which was more than six months after the occurrence of the alleged unfair labor practices, a complaint was issued by the Board alleging that petitioners committed unfair labor practices in that they discharged employee Thomas Frederick on December 27, 1950, and employee Clarence Leeper on December 28, 1950, "for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid and protection" [R. 5-6], and that about January 21, 1950, petitioners interfered with, restrained, and coerced its employees in the exercise of certain rights guaranteed in Section 7 of the Act by attempting to influence them against the Union [R. 6, par. 6]. A representative consent election had been held January 23, 1951 [R. 2], at which the employees voted against union representation.

A hearing was held before the Examiner and at the end of the evidence in chief of the general counsel he dismissed for insufficient evidence, the charge contained in

paragraph 6 of the Complaint involving an alleged violation of Section 8(1) of the Act [R. 137-140] which charged an attempt to influence employees against the Union. The Examiner found that the employee Thomas Frederick had not been discharged for cause but had been discharged because of his activity in behalf of the Union and because he sought to secure the support of other employees in concerted activities [R. 23-24], and that petitioner had discharged employee Leeper and that Leeper had not voluntarily quit his job [R. 18-20]. The Examiner recommended, and the Board adopted the recommendations, that Frederick be offered reinstatement with pay and that the Estate of Leeper (who had died) be compensated for any monetary loss. It recommended the posting of a notice containing this offer of reemployment to Frederick and a statement that petitioner would not discourage concerted activities on the part of the employees or membership in the Union and that the employees were free to form a labor organization or to join or assist the particular Union.

Before the Board, and before the Court of Appeals, petitioners asserted that the findings and recommendations and the proposed order should not be enforced for the reasons:

(1) That the Board was without power to issue the Complaint more than six months after the alleged commission of the alleged unfair labor practices by virtue of the provisions of Section 10(b) of the Act and that al-

though the original charge was filed within the six months' period it alleged that the employees were discharged for engaging in "union organization activities for the purpose of discouraging the formation of a" particular union, while the complaint filed after the six months' period contained a new and different charge of unfair labor practice, to wit, that the employees were discharged "for engaging in concerted activities for the purpose of collective bargaining";

(2) That employee Leeper had quit his job and not been discharged;

(3) That the employee Frederick had been discharged for cause and not for union organizational activities or concerted activities known to the petitioners;

(4) That the Board should have made findings in favor of petitioners upon the charge which was dismissed for insufficient evidence but instead of so doing it drew adverse inferences and conclusions which were predicated solely on the evidence introduced to support the dismissed charge.

The Court of Appeals ruled against petitioners and ordered enforcement of the Board's order.

REASONS FOR ALLOWANCE OF THE WRIT.

I.

The Decision Is in Direct Conflict With the Decision of the Court of Appeals for the Fourth Circuit on the Same Matter and Is Contrary to the Provisions of the Act.

As stated above, the original charge filed within six months from the date of the discharge of the employees, alleged that they were discharged "for engaging in union organizational activities for the purpose of discouraging the formation of the Union." More than six months after the date of discharge, the complaint was issued. The complaint did not charge that the employees were discharged for engaging in union organizational activities for the purpose of discouraging the formation of the Union or for any other activities related to the Union. On the contrary, it is alleged that the employees were discharged more than six months prior to the issuance of the Complaint for engaging in "concerted activitiec with other employees for the purposes of collective bargaining and other mutual aid and protection" [R. 5-6].

The Court of Appeals for the Fourth Circuit, in the case of *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F. 2d 749, on an identical fact situation, held that where a charge was filed within the six months period alleging discharge of employees *for engaging in Union activities* and a Complaint was issued more than six months after the commission of the alleged acts charging that the em-

ployer engaged in unfair labor practices by discharging employees for engaging in *"concerted activities,"* that the proceedings were barred by the Statute of Limitations, Section 10(b) of the Labor Management Relations Act, 29 U. S. C., Section 160(b), which provides that "no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The Court held that the complaint was a substitute for the original complaint and that it introduced a new and entirely different charge of unfair labor practice from that contained in the original charge.

The decision of the court below is directly contrary to this decision of the Court of Appeals for the Fourth Circuit.

In *Gaynor News Co. v. N.L.R.B.*, (2 Cir.), 197 F. 2d 719, certiorari granted and cause argued November 1953, October 1953, No. 7, the Court of Appeals held that when a charge was filed within the six months period alleging discrimination against one nonunion employee an amended charge could be filed after the six months period *alleging the same discriminatory practice* against additional nonunion employees. The basis of the decision was that the amended charge "related back" or defined "more precisely" the *charges enumerated* within the original and timely charge.

Section 10(b) of the Act, 28 U. S. C., Section 160(b), expressly provides that the Board "shall have power to issue and cause to be served" a "complaint stating" *the respects* in which any person has engaged in an unfair labor practice "provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof." The decision of the court below is contrary to this provision of the statute. The statute empowers the Board to issue a complaint only within the six months' period and such complaint may be issued only "whenever it is charged that any person has engaged in or is engaging *in any such unfair labor practice,* the Board . . . shall have power to issue . . . a complaint *stating the charges in that respect.*" The Statute contemplates that the original charge shall specify the respects in which the conduct constitutes an unfair labor practice. The complaint can only be issued after the expiration of the six months' period if it contains the same charges, that is, the same respects in which the conduct constitutes an unfair labor practice.

II.

This Case Raises Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

The Labor Management Relations Act applies nationwide. The statute of limitations rule should be the same in all circuits. One rule should not apply in one circuit and another rule in another cricuit. Labor, Management, the Board and the Courts in all circuits should know whether the filing of an original charge with the Board within six months of the alleged commission of a particular unfair labor practice, is or is not sufficient to confer power on the Board to issue a complaint more than six months later and even years later, specifying the commission of a new and different charge of unfair labor practice from that specified in the original complaint.

Under the decision sought to be reviewed the six months' statute of limitations is in effect a nullity so long as the original charge contains an allegation of the commission of any unfair labor practice. Under this ruling the Board may at any time thereafter issue a complaint which abandons the original charge and introduces a new and entirely different unfair labor practice. This does violence to the congressional intent manifested by the language of the statute which limits the power of the Board to issue a complaint within six months from the date of the alleged commission of the unfair practice complained of.

Under the original National Labor Relations Act, Section 10(e), (f), it was only required that the findings be supported by evidence. This Court, in *Consolidated Edison Company v. N.L.R.B.*, 305 U. S. 197, held that this

meant substantial evidence. The 1947 amendments to the act now require that the findings of the Board shall be conclusive only "if supported by substantial evidence on the record considered as a whole (§10(e))." Section 10(c) requires that there must be a "preponderance of the testimony" to justify a finding of commission of an unfair labor practice. This places a greater responsibility on the reviewing Courts.

In the instant case, although the Board found that employee Leeper had been discharged for engaging in concerted activities, the undisputed evidence is that Leeper demanded that he be paid for the lunch hour period and an additional bonus for the night shift, and that if he was not paid he would quit [R. 144-146, 152-154, 161, 179, 180, 190]. Petitioners declined to agree to Leeper's demands, treated his offer as one that he was quitting, and gave him his termination pay. The undisputed evidence is that Leeper was not engaged in union activities and was opposed to unions.

As to employee Frederick, the evidence is that he was laid off twice for sloppy work, that shortly before Christmas the foreman wished to discharge him for having disobeyed orders, but petitioners determined to keep him on until after Christmas, that he thereafter disobeyed orders and was discharged, Frederick was admittedly engaged in union organizational activities but the record is devoid of evidence that petitioners had any knowledge thereof. The first knowledge by petitioners that Frederick was a union organizer was acquired several weeks after his discharge.

Since the complaint did not allege that petitioners engaged in any unfair labor practices with respect to the

union involved and the only charge in the complaint with respect to the union was dismissed for insufficient evidence, the making of an order requiring the posting of a notice that the employees were free to join that particular union was unwarranted.

Wherefore, petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit sitting at San Francisco, California, commanding that Court to certify and to send to this Court on a day certain to be named therein, a full and complete transcript of the record and all proceedings had in this case, numbered and entitled on its docket No. 13690, to the end that this case may be reviewed and determined by this Court; that the said decree of the United States Court of Appeals for the Ninth Circuit may be reversed by this Court; and that your petitioners may have such other and further relief in the premises as may seem just and proper.

Respectfully submitted,

ELWOOD C. MARTIN,
FRED A. NEMEC,
A Co-Partnership Doing Business as
Nemec Combustion Engineers,
Petitioners.

R. D. SWEENEY,
J. E. SIMPSON,
Attorneys for Petitioners.

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ELWOOD C. MARTIN, FRED A. NEMEC and ROBERT W. NEMEC, a co-partnership doing business as NEMEC COMBUSTION ENGINEERS,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION.

I.

The Decision Below Is in Direct Conflict With the Decision of the Court of Appeals for the Fourth Circuit on the Identical Point.

As stated above, Section 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. This means that the complaint must allege the same unfair labor practice as was alleged in the original charge if the complaint is issued more than six months after the commission of the practice. The statute does not contemplate that a charge may be filed alleging any unfair labor practice and the

running of the statute of limitations thereby stopped as to other unfair labor practices.

In *Joanna Cotton Mills Co. v. N.L.R.B.* (4 Cir.), 176 F. 2d 749, the identical question was presented as that here involved. In that case the original charge alleged that certain employees were discharged for engaging in "union activities." More than six months later an amended charge was filed alleging that the employees were discharged for engaging in "concerted activities." The Court of Appeals held that the amended charge was expressly filed as a substitute for the original charge, that it introduced a new and entirely different charge of unfair labor practice in that the original charge referred to a discharge of employees for engaging in "union activities" and not for engaging in "concerted activities" while the amended charge referred to "concerted activities" and not to "union activities."

The decision below refers to the *Joanna Mills* case but refused to follow it.

These are the only courts of appeal that have decided this identical point.

The *Gaynor News Co.* case (2 Cir.), 197 F. 2d 719, now pending before this court, held that it was proper to enlarge upon the original charge by an amended charge naming additional employees as having been the subject of the *same discriminatory practice,* that is, failure to pay benefits to the nonunion employees which were paid to union employees. Although the statute of limitations is involved in the *Gaynor* case, the identical question as to whether the amended charge alleged a new and different unfair labor practice is not directly involved.

The courts of other circuits have also held that the original charge may be enlarged upon to include other factors or other employees subjected to the same unfair labor practice, but those cases did not involve a new and different unfair labor practice.

Section 7 of the Act confers different rights upon employees classified as follows: (1) to self organization, (2) to form, join or assist labor organizations, (3) to bargain collectively through representatives of their own choosing, (4) to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and (5) to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

The original charge filed by the union was that two named employees were discharged for engaging in union organizational activities with respect to a named union. The complaint issued more than six months after the alleged happenings entirely abandoned all references to a discharge for union activities and substituted a charge that the employees were discharged for engaging in "concerted activities."

These are different rights conferred upon employees and require different evidence. The elements of the two are not the same. The discharge for engaging in union activities of necessity requires proof respecting a union. Only one employee may be involved. Engaging in concerted activities does not require that any union be involved and it requires concert of action by two or more employees. If the two rights are the same then one of them is surplusage.

Since the Labor Relations Management Act is nationwide in operation, the conflict between the fourth and ninth circuits should be settled.

Petitioners contend that the ruling of the Fourth Circuit is correct and in accordance with the language of the statute, but that the decision below is not.

As illustrative of the point the evidence in the record discloses that the employee Thomas Frederick was engaged in attempting to have employees sign union authorization cards but that his activities were not known to petitioners. Employee Leeper, on the other hand, was opposed to unions and was not engaged in any union activities. But the Board held, and the court agreed, that Frederick was engaged in concerted activities when the evidence disclosed that his only activities related to a union, and the petitioners were not charged in the complaint with having discharged him for engaging in union activities.

The effect of the decision below would be to permit the filing of a general omnibus charge that an employer committed any unfair labor practice and after the lapse of the six months period of limitation to substitute a charge of an entirely different and new unfair labor practice.

This does violence to the language of Section 10, which provides that it may be charged that any person has engaged in or is engaging in "any such unfair labor practice" that the Board may issue a complaint "stating the charges in that respect." This language would appear to mean that the power of the Board is limited to issuing a complaint containing the charge of the same unfair labor practice complained of in the original charge.

II.

The Findings of the Board Are Not Supported by Substantial Evidence Proving the Unfair Labor Practices Alleged in the Complaint.

As stated above, a charge of unfair labor practice must be established by a preponderance of substantial evidence.

In the instant case the evidence is undisputed that employee Leeper, in the presence of about fifteen other employees, demanded that he be paid for the lunch hour period and a night shift bonus, and that if his demands were not met he was quitting [R. 144-146, 152-154, 161, 179, 180, 190]. Petitioners believed that Leeper was quiting unless they met his demands and gave him his termination check. Leeper was not engaged in union activities but was opposed to them [R. 72, 166-167]. Other employees who were present stated that Leeper was speaking for himself alone [R. 153] and one employee demanded and received his termination check [R. 60-61, 71].

Leeper had the right to quit or offer to quit and the employer had the right to accept his offer to quit. This undisputed evidence utterly fails to establish the original charge that Leeper was discharged for engaging in union organizational activities, and at the most it established only that the employers, in good faith, believed that Leeper was quitting if they did not meet his demands. The evidence fails to establish a discharge for engaging in concerted activities.

The other employee, Thomas Frederick, was engaged in union organizational activities but he was also a sloppy workman. The foreman had requested permission to discharge him for inefficiency and disobedience of orders,

but the employer decided not to do so until after the Christmas holidays. The first knowledge that petitioners had that Frederick was engaged in union activities was after he was discharged [R. 201-202, 159]. In the absence of knowledge of his union activities it is manifest that those activities could not have been the reason for his discharge. He admitted that he engaged in these activities on the sly [R. 119].

Petitioners contend Frederick was discharged for just cause.

It is submitted that even though the evidence established that petitioners knew that Frederick was engaged in union activities, that this does not constitute substantial evidence that he was discharged for engaging in concerted activities with other employees.

It is respectfully submitted that a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

R. D. SWEENEY,

J. E. SIMPSON,

Counsel for Petitioners.

APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Unfair Labor Practices.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

Prevention of Unfair Labor Practices.

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other

means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 511

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 238-245) is reported at 207 F. 2d 655. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 11-31, 37-41) are reported at 100 NLRB 1118.

JURISDICTION

The decree of the court below (R. 246-251) was entered on December 4, 1953. The petition for a writ of certiorari was filed on December 28, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-3.

QUESTIONS PRESENTED

1. Whether a charge averring that petitioners had discharged two employees because they "were engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" adequately supports, under the limitations proviso to Section 10(b) of the Act, the complaint issued by the Board's General Counsel alleging that petitioners discharged the two employees because they engaged in "concerted activities with other employees for purposes of collective bargaining and other mutual aid or protection," where the Board finds that one employee was discharged for Union activity and the other for concerted activity for mutual aid or protection, within the meaning of the Act, but unconnected with the particular Union's activity.

2. Whether substantial evidence on the record considered as a whole supports the Board's findings that petitioners discharged two employees in violation of Section 8(a)(1) and (3) of the Act.[1]

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[1] Petitioners pose a third question relating to an alleged deprivation of a "fair trial." Petitioners do not further explain the basis for this question. In any event, it does not appear to present any issue of importance warranting further review.

STATEMENT

A. *The Board's findings of unfair labor practices*—On February 1, 1951, the International Union, United Automobile Workers, A.F.L., hereafter called the Union, filed a charge averring, in relevant part, that petitioners in violation of Section 8(a)(1) and (3) of the Act had discharged employees Thomas Frederick and Clarence Leeper on or about December 28, 1950, "upon the grounds that these employees were engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" (R. 2). Thereafter, on November 14, 1951, the General Counsel of the Board issued, on the basis of the charge, a complaint alleging, in relevant part, that petitioners in violation of Section 8(a)(3) and (1) discharged Frederick and Leeper on or about December 27 and 28, 1950, "for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid or protection" (R. 5-6). In their answer, petitioners denied these allegations and averred that Frederick had been discharged for cause and Leeper had voluntarily quit (R. 7-11).

Upon the evidence adduced at the hearing on the complaint the Board found as follows:

(a) *The discharge of Thomas Frederick*—Except for brief economic layoffs, Frederick worked continuously for petitioners from 1946 until his discharge on December 28, 1950, in various capacities including machining axles, machining carbon in-

sert[s], and setting up and repairing machines (R. 15-16; 87-89, 157, 170, 192-194-195). In October 1950, when the Union began to organize the plant employees, Frederick served as its one-man organizing committee (R. 13-14; 51-53, 89-91, 97-98). On December 27 and 28, Frederick, with the aid of one or two others, distributed about 100 union authorization cards among the employees (R. 16; 55-56, 90, 102-103, 104) and obtained signed cards from 55 employees representing about half of the work force, (*ibid.*).

When Foreman Gilly came upon Frederick in the act of soliciting employees to sign the union cards, Frederick facetiously suggested that Foreman Gilly himself sign a union card (R. 16; 90-91, 104-105, 119-120). Foreman Gilly made no comment, but at the close of the shift handed Frederick his pay check and said he was discharged because petitioner Fred Nemec, a partner in the firm, had complained about Frederick's laxity in keeping his machine clean (R. 16, 17; 92, 106-107). Frederick protested, "You know that isn't right, Ed," explained that his job of setting up and repairing the machines did not, unlike that of the operator, include the task of cleaning the machines, and suggested that he was really being discharged because of his organizational activities among the employees (R. 16; 92-93, 107, 178). Gilly replied only, "All I know is what the old man told me" (R. 16; 92-93, 107).

Although Frederick was told, at the time of his discharge, that the reason for his discharge was because Nemec had complained about Frederick's

failure to clean his machine, Nemec himself denied he had been consulted about Frederick's discharge (R. 20; 159). Both Nemec and Gilly admitted that the last complaint to Frederick about this matter was made at least two years prior to his discharge (R. 20-21; 165-166, 182-183). Moreover, Gilly also admitted that it was the operator's job, not that of the maintenance man, to clean the machine (R. 183). At the hearing, petitioners asserted for the first time that Frederick was discharged because he was a poor workman and insubordinate during the last month of his employment (R. 16; 172-177; 184, 199).

The Board rejected petitioners' explanation for Frederick's discharge as mere pretexts and, upon the entire record, concluded that petitioners had discharged Frederick because of his Union activity, thereby violating Section 8(a)(3) and (1) of the Act (R. 39).

(b) *The discharge of Clarence Leeper*—Leeper, a welder of 22 years' experience, worked on the night shift in petitioners' welding shop from October until December 28, 1950, when he was discharged (R. 12, 20; 64, 125).[2]

During the night shift of December 27, Leeper and the 14 other welders of the shop assembled in one of the welding booths where they spoke to Night Superintendent Milliron about securing a night bonus and a paid lunch period (R. 14; 57-58). At their request, Milliron called in petitioner

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[2] Leeper died six months later, before the hearing was held in the instant case (R. 12; 134).

Nemec, telling him "there [is] a work stoppage in the welding shop and Mr. Leeper [has] all the welders in an uproar" (R. 14; 152). When Nemec arrived, Leeper, on behalf of his fellow employees (R. 60, 69, 148), told Nemec that the men wanted a night shift bonus and a paid lunch period, and declared: "We want a showdown on this lunch hour pay. . . . If we don't get it, we are going to walk out" (R. 14; 70, 153). Nemec replied that he would look into the matter (R. 14; 60, 70, 145, 153). Leeper then stated that if their demands were not met he was "quitting" (R. 14; 60, 70, 153). One employee thereupon intervened, saying "I hope you don't mind if we don't strike along with you" (R. 153). Another announced that "[s]o far as I am concerned, you can give me mine now" (R. 14; 60-61, 152), whereupon Nemec answered, "Well just go on to the office. We don't want any hot-headed characters around here" (R. 60-61). Leeper concluded the meeting by giving Nemec 24 hours in which to reach a decision (R. 14-15; 60, 70, 154).

After Nemec left the department, Leeper said to another welder, "When we check in . . . [W]e will come in at 4:30 and get our hoods and march out in front of the machine shop so they can see us" (R. 146). Leeper then went back to work for the remainder of the shift (R. 15; 61, 146). On leaving the plant he did not, as was customary for employees leaving permanently, take his tools with him R. 20; 66, 126-127).

The following afternoon, December 28, Leeper left home at the usual hour, before 4 p.m., taking

his lunch along (R. 15; 126). Shortly thereafter, Nemec came to the house looking for Leeper but was told by Leeper's wife that Leeper had already left for work (R. 15; 125-126, 137, 155). When Nemec handed her Leeper's paycheck to date and said that Leeper had quit, Mrs. Leeper expressed surprise (R. 155-156). Nemec then explained, "Well, he has given us an ultimatum of several things he wants and we can't meet his demands. Therefore we are letting him quit" (R. 155-156). Nemec declared that he "hated to see [Leeper] go" but Leeper had gotten the welding shop in an uproar and "we couldn't be pushed around like that. . . . But due to the trouble he had stirred up in the welding shop we couldn't put him back" (R. 126, 155, 163-164). Nemec then left taking back with him Leeper's paycheck (R. 126, 130-131).

Meanwhile, Leeper had returned to the plant but he was not allowed to work (R. 15; 61). During the next few days, Leeper made several attempts to return to work, telephoning the plant to find out the reason he was not being permitted to work and offering to waive his demand for retroactive pay (R. 15; 127-129, 162-163). Nemec refused, however, because "things had gone as far as they had. There was so much trouble stirred up it just wouldn't be right" (R. 163). Nemec did, however, accede to Leeper's request for 4 hours call-in pay for December 28, the day following the meeting in the welding shop (R. 20; 132-133, 159-160).

The Board, on the basis of the evidence summarized above, rejected petitioners' claim that Leeper

had quit and concluded that he had been discharged because of his role in presenting the welders' demands for increased compensation; that this incident constituted concerted activity protected by Section 7 of the Act; and that, therefore, his discharge for engaging in such activity constituted a violation of both Section 8(a)(1) and 8(a)(3) (R. 20, 38).

B. *The Board's order.*—The Board's order (R. 39-41), in conventional form, requires petitioners to cease and desist from the unfair labor practices found; to offer immediate reinstatement to Frederick and compensate him for loss of pay caused by the discrimination against him; to make whole the estate of Leeper for loss of pay suffered; and to post appropriate notices of compliance with the order.

C. *The decision of the court below.*—The court below concluded (R. 241-245) that the Board's unfair labor practice findings, summarized above, were supported by substantial evidence and enforced the Board's order in full.[3] The court also rejected (R. 239-241) petitioners' contention that the charge filed against petitioners which averred that the two employees had been discharged for "engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" was at variance with the allegations of the complaint that they were discharged "for the

[3] The court below (R. 245, n. 3), upholding the Board's finding that Leeper's discharge was violative of Section 8(a)(1) of the Act, deemed it unnecessary to determine whether, as the Board further found (*supra*), his discharge was also violative of Section 8(a)(3).

reason that they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid or protection," and that the complaint was not therefore supported by a timely and appropriate charge, with the result that under the six month limitation proviso contained in Section 10(b) the proceedings before the Board were invalid. The court stated (R. 239, 241):

> [The] charge and complaint alike identified the allegedly illegal transaction by giving the names of the individuals concerned and the date of their dismissal. The difference between them is one of detail as regards the description of the activity engaged in.
>
> * * * * *
>
> We conclude that the charge in the case before us supplied an adequate foundation for the complaint and that petitioners suffered no prejudice in consequence of such variation as existed.

ARGUMENT

1. Petitioners' contention (Pet. 7-9, 13-16) that because of the "variance" between the charge and the complaint, the complaint was not adequately supported by an appropriate timely charge and hence the proceedings before the Board were barred by the limitations proviso of Section 10(b), presents no question warranting review by this Court. With respect to Frederick, who was discharged because of his union activity, the claim of variance is wholly without foundation. Obviously, there is no material variance between the averment

of the charge that he was discharged for union organizational activities and the allegation of the complaint that he was discharged for engaging in concerted activities with other employees for purposes of collective bargaining; either averment fits Frederick's case exactly. With respect to Leeper, who was discharged for his role in presenting the welders' demand for increased compensation, the charge and the complaint, as the court below observed (R. 239), adequately identified the allegedly illegal action on petitioners' part and "[the] difference between them is one of detail as regards the description of the activity engaged in." In this posture, the claim of variance, particularly in view of the further fact, noted by the court below (R. 241), that petitioners have made no showing of prejudice, is both hypertechnical and inconsequential. Cf. *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 903-904 (C.A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.,* 190 F. 2d 12, 13 (C.A. 5); *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415 (C.A. 10). The Court of Appeals for the Fourth Circuit, as petitioners point out, has apparently expressed a contrary view in *Joanna Cotton Mills* v. *National Labor Relations Board,* 176 F. 2d 749, 754, but the view thus expressed was, as the Fourth Circuit stated, only an alternative ground for its decision in the case and there is therefore no real conflict between the controlling grounds of decision in the two cases. Moreover, the *Joanna* case may be distinguished from the instant case. There,

in the Fourth Circuit's view, the amended charge, which was filed more than six months after the unfair labor practice charged, was "expressly filed as a substitute" for the original charge (176 F. 2d at p. 754), so that, with the original charge having been thus superseded, there was no timely charge to support the complaint. No such substitution was made here and the complaint rests upon a charge filed within six months of the unfair labor practice. Finally, as the court below also stated, the dictum in *Joanna* has not been followed in other circuits in comparable cases. Cf., in addition to cases cited above, *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2); *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 33 LRRM 2324, 2330 (C.A. 2, decided December 31, 1953); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14-16; *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737-738 (C.A. 5); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C.A. 7).

2. Petitioners' challenge (Pet. 10-12, 17-18) to the adequacy of the evidence supporting the Board's findings also presents no question warranting review by this Court. The court below, correctly we think, concluded (R. 241) that "the inference drawn by the examiner and the Board as respects the motivating cause [of Frederick's and Leeper's discharge] are warranted by the evidence." This Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find

the record was tilting one way rather than the other, though fair-minded judges could find it tilting either way." *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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